No. 2705

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS R. SHERIDAN,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

JOHN L. McNAB,
Humboldt Bank Building, San Francisco,
Attorney for Plaintiff in Error and Petitioner.

JAMES W. RYAN,
Of Counsel.

Filed this.....day of November, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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To Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The plaintiff in error respectfully petitions this Honorable Court for a rehearing of this cause, upon the following grounds:

I.

By the construction given to the language of the indictment, in holding that the offense charged therein is abstracting money of the bank and not money of the depositors, the majority of the Court have necessarily held that the three instructions of the trial Court to the jury, that the plaintiff in

error was being tried for abstracting money of the depositors, were erroneous and prejudicial to him. Yet, although those specific instructions were excepted to (Tr. Rec. p. 242, lines 13-29; p. 242, line 29 to p. 243, line 10), and assignments of error (Nos. XXXVIII and XXXIX and XL, pp. 272-273, Tr. Rec.) were based thereon, the majority of the Court have overlooked and neglected to even mention in their opinion either those instructions, exceptions or assignments of error, notwithstanding the fact that His Honor, Judge Ross, quotes those instructions in full in his dissenting opinion. Counsel for plaintiff in error most earnestly submit that in view of the decision of the majority of the Court regarding the demurrer, the plaintiff in error is entitled to a new trial because of those erroneous instructions. At the very least he should be granted a rehearing by the Court so that it may consider the exceptions to those instructions and the assignments of error based thereon, because as they are not mentioned in the opinion of the majority of the Court it must be assumed that they were overlooked and not considered.

The construction of the language of an indictment is a question of law. The jury are bound under their oaths to take the law from the Court. *The trial Court in this case charged the jury three distinct times that they were trying plaintiff in error for abstracting money of the depositors and not money of the bank.* The fact that the indictment was capable of the construction that it charged

the abstraction of money of the bank is immaterial in view of the fact that that construction was not placed upon it by the only person entitled under the law to construe it—the trial Judge. Therefore since the trial Court instructed the jury to find the plaintiff in error guilty or not guilty of abstracting money of the depositors, and since under those instructions the jury found as a fact that the plaintiff in error abstracted money of the depositors and not money of the bank, **the plaintiff in error was actually convicted of abstracting money of the depositors** (and not money of the bank), *which is not an offense against the United States.*

A reading of the testimony of the depositors will convince the Court that they believed that the plaintiff in error was being tried for abstracting money belonging to them and not to the bank, and in view of the instructions of the Court it must be conclusively presumed that the jury were of the same belief.

The fact that the plaintiff in error contended that he had been authorized by the depositors to withdraw their money, and the emphasis given to the evidence both for and against that contention, also tended very strongly to confirm the jury in their conviction that the plaintiff in error was being tried for abstracting money of the depositors.

The fact that the two deposits as to which the plaintiff in error was convicted, were deposits of an elderly, nervous and excitable lady, and an

elderly, illiterate man, and that plaintiff in error was acquitted as to all the other deposits, shows that the verdict resulted from sympathy of the jurors for those depositors because money belonging to them—and not to the bank—had been abstracted by the plaintiff in error, even though those depositors might have consented to it. The jury undoubtedly believed that those depositors suffered the loss of their money because of the alleged abstraction by the plaintiff in error, whereas as a matter of fact they suffered no injury whatever if the money belonged to the bank, and that point would have been made entirely clear to them, and they would probably have acquitted plaintiff in error, had the trial Court instructed the jury that they were trying plaintiff in error solely for abstracting money of the bank.

Even this learned Court itself, in its majority opinion, refers to the moneys alleged to have been abstracted by the plaintiff in error as "the depositors' moneys". On page 9, lines 29 to 32, of the majority opinion this Court says:

> "The letters signed on June 20, 1911, by both of these depositors at the instant of the National Bank Examiner were clearly ineffectual to legalize **the abstraction of the depositors' moneys by the plaintiff in error."**

If, after discussing at length the question whether or not the money belonged to the depositors, and

deciding that it did not, this learned Court is still subconsciously of the opinion that the money did belong to the depositors, surely it ought not hesitate to grant a rehearing to plaintiff in error, who has suffered grievous injury because the jury, acting under the instructions of the trial Court, convicted him of unlawfully abstracting money belonging to the depositors—which is not an offense against the United States and of which the Court had no jurisdiction.

II.

In its majority opinion this Court, in holding that the evidence does not show embezzlement, states (page 8):

> "But it does not follow, and the court would not be justified in holding that because the plaintiff in error was the manager of the bank the possession of moneys in the bank was his possession and not that of the bank. Clearly, all funds deposited were deposited with the bank, and not with the president and manager thereof, and the possession of the deposits was the bank's possession."

We respectfully submit that under that reasoning of the Court *there could not possibly be embezzlement by an officer or employee of a corporation.* Yet Congress provides in Section 5209 for the offense of embezzlement by an officer of a national banking corporation. Under that reasoning there has never existed a necessity for the

creation of the offense of embezzlement. Possession is a physical fact of human control over property, exercisable only by a natural person. In this case the undisputed evidence is that the board of directors had turned over the entire physical control of all the bank's property to the plaintiff in error. Counsel deem it to be elementary and unquestionable law that the agent or employee of a corporation who has actual physical control of the corporation's property for a specified purpose has possession, and if he fraudulently appropriates it to his own use he is guilty of embezzlement. (See 15 Cyc., 493-494; Clark on Criminal Law, p. 307, Sec. 100.)

In United States v. Harper, 33 Fed. 471, 475-476, an indictment under Section 5209, the Court said:

> "If the evidence establishes that the business and assets of the bank were actually or practically intrusted to the care and management of the defendant, so that, by virtue of his position as vice-president, director, or agent, he had not merely access to, or a constructive holding of, but such actual custody of the funds, moneys, and credits of the association as enabled him to have and exercise control over the same, that would place him in the lawful possession of said funds, or other property; and if, while so lawfully in possession of such assets, funds, and credits, or other property committed to his care and custody for the benefit of the bank, he wrongfully converts any part or portion of said assets to his own use, with intent to injure or defraud the association, he would thereby commit the

> offense of embezzlement. If his position and employment gave the defendant a superior or a joint and concurrent possession with subordinate employees or agents of the bank, that would be sufficient to place him in such lawful possession as would enable him to commit the crime of embezzlement in relation to assets of the bank so committed to his keeping. If, for example, his position and employment in the bank gave the defendant a joint or concurrent possession and custody of the bank's moneys, funds, and credits with the teller, cashier, or agent; and if, while so lawfully in possession, either alone or jointly with other officers or agents of the bank, he wrongfully converts said funds or assets to his own use, with intent to injure or defraud the association, he would thereby commit the offense of embezzlement."

If the Court is of the opinion that the offense of embezzlement cannot be committed by an officer or employee of a national bank because the officer or employee cannot have possession of the bank's property, counsel believe that its opinion will be of the greatest interest to all the prosecuting officers of the Department of Justice of the United States who are charged with the drafting of indictments, and who have drafted indictments for embezzlement under this statute in virtually thousands of cases against presidents of national banks. We therefore respectfully request a rehearing that the Court may have such aid as counsel can give in thoroughly arguing that question to the end that the law, not only controlling this case, but scores of similar cases may be definitely settled.

III.

We respectfully call the Court's attention to the fact that, even under the Court's own theory, the evidence in this case merely shows that the plaintiff in error drew a memorandum check and made a deposit slip which resulted in causing a credit to be entered in his account. Certainly those acts in themselves did not constitute an unlawful abstraction—or taking. When was any money taken from the bank or delivered to the plaintiff in error? Was it taken from the vaults of the bank by the plaintiff in error himself? Or was it delivered to him by another employee of the bank upon his drawing a check on his own account which had been unlawfully increased in credit? In the latter event the offense would be willful misapplication of the bank's moneys, or obtaining money under false pretenses, and not unlawful abstraction, and the plaintiff in error would be entitled to an acquittal under this indictment. We respectfully insist that there is no evidence whatever in reply to any of these questions, which are the most material questions in the case.

IV.

Two of the Judges of this Court have held that the indictment charges the abstraction of money *of the bank*. One of the Judges of this Court, and

the Judge of the trial Court, have held that it charges the abstraction of money *of the depositors.* Where the language of an indictment is ambiguous—and, *a fortiori,* where the Judges are equally divided—the Supreme Court of the United States has held that the construction more favorable to the accused shall prevail.

Bolles v. Outing Co., 175 U. S. 262, 265.

Would not justice better be effected in this case if the two learned Judges delivering the majority opinion were to state that in their view the more reasonable construction of the indictment is that it charges the abstraction of money of the bank, but because of its ambiguity and the fact that one of their associate Judges is of a contrary opinion, that the principle announced by the Supreme Court in the case last above cited should be applied, and the demurrer to the indictment be sustained, or at least that the exceptions to the instructions of the trial Court be sustained?

We respectfully submit that a rehearing should be granted plaintiff in error.

Dated, San Francisco,
November 15, 1916.

JOHN L. MCNAB,
Attorney for Plaintiff in Error and Petitioner.

JAMES W. RYAN,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am the attorney for the plaintiff in error and petitioner in the above entitled cause, and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

JOHN L. MCNAB,
Attorney for Plaintiff in Error and Petitioner.